86-51

No. 85-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

KIOWA TRIBE OF OKLAHOMA,
Petitioner-Respondent,

vs.

ROBERT LEWIS and DIANA LEWIS,
Respondents-Cross Petitioners.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should grant the cross-petition of Respondents Robert and Diana Lewis for Writ of Certiorari, in the event it grants the petition for writ filed by the Kiowa Tribe of Oklahoma, in order to determine whether cross-petitioners should be allowed attorneys' fees and costs under the unusual and prolonged circumstances of this case.

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OPINIONS AND JUDGMENTS BELOW

Upon dismissal of *Kiowa Tribe of Oklahoma v. Lewis*, Civil Action No. 83-1672, the United States District Court for the District of Kansas awarded cross petitioners herein costs and attorneys' fees. (Petition for Writ of Certiorari, No. 85-2089, App. E.) The United States Court of Appeals for the Tenth Circuit affirmed the dismissal of the action, but reversed the award of attorneys' fees and costs in *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985). (Petition for Writ of Certiorari, No. 85-2089, App. A.)

JURISDICTION

The United States District Court for the District of Kansas entered its judgment dismissing the Kiowa Tribe of Oklahoma's action and awarding Robert and Diana Lewis attorneys' fees and costs on October 28, 1983. Before the trial court could determine the proper amount of the award, the Kiowa Tribe filed its noice of appeal to the Tenth Circuit on November 23, 1983. The Tenth Circuit affirmed in part and reversed in part the judgment of the district court in a decision filed November 21, 1985. (Petition for Writ of Certiorari, No. 85-2089, App. A.) The Tenth Circuit denied petitions for rehearing on March 6, 1986. (Petition for Writ of Certiorari, No. 85-2089, App. C.) The Tenth Circuit judgment was filed March 17, 1986. (Petition for Writ of Certiorari, No. 85-2089, App. B.)

The Kiowa Tribe moved the United States Supreme Court for an extension of time in which to file a petition for writ of certiorari. The Tribe was granted an extension to June 20, 1986. (Petition for Writ of Certiorari, No. 85-

2089, App. D.) Mr. and Mrs. Lewis received the Tribe's petition for writ of certiorari on June 16, 1986. Respondents Robert and Diana file this Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 2101 and Rules 17 and 19 of the Rules of the Supreme Court of the United States and request that it be granted only in the event the Court grants the petition of the Kiowa Tribe.

STATUTORY AND OTHER AUTHORITIES INVOLVED

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he had read the pleading,

motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. § 1738 provides in pertinent part:

Such Acts, records and judicial proceedings [of any State] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF CASE

Seth Allan Lewis was born in Wichita, Kansas, on January 29, 1981. He is the out-of-wedlock child of Carmon Perciado and Ms. T.M.L. Carmon Perciado has a Kiowa blood degree of five-eighths and is an enrolled member of the Kiowa Tribe. Ms. L. is non-Indian. (*In*

re Adoption of Baby Boy L., 231 Kan. 199, 201, 643 P.2d 168, 172 (1982).)

At the time of Seth's birth and continuing thereafter, Perciado was incarcerated at the Kansas State Industrial Reformatory. He never saw or had custody of the baby. (*In re Baby Boy L.*, 231 Kan. at 202, 205, 212, 643 P.2d at 172-73, 174, 180.)

On January 29, 1981, and again on April 14, 1981, Ms. L. executed a voluntary consent to the adoption of her baby. She expressly limited both consents to adoption only by the named prospective parents, respondents-cross petitioners herein Robert and Diana Lewis. (*In re Baby Boy L.*, 231 Kan. at 201-02, 643 P.2d at 172-73.)

The Lewises' petition for adoption and Ms. L.'s first consent were filed January 29, 1981, in the probate division of the Sedgwick County, Kansas District Court. The court granted Mr. and Mrs. Lewis temporary care and custody of Seth. Thus, since birth, the now five-year-old Seth has always lived with and been cared for by his parents, Robert and Diana Lewis. (*In re Baby Boy L.*, 231 Kan. at 201-02, 643 P.2d at 172-73.)

Notice of the adoption proceeding was served personally on Carmon Perciado at the Kansas State Industrial Reformatory. Perciado filed an affidavit of indigency and the court appointed counsel. On March 30, 1981, proceedings began in Sedgwick County District Court to determine the fitness of Perciado as a parent. The court was advised on April 1, 1981, that the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (ICWA or Act) might apply. The proceedings were continued so that notice could be given to petitioner-respondent herein, Kiowa Tribe of Oklahoma. (*In re Baby Boy L.*, 231 Kan. at 202, 643 P.2d at 172-73.)

The Kiowa Tribe filed a motion to intervene on May 8, 1981. On May 13, 1981, Ms. L. discovered that the Kiowa Tribe intended to enroll Seth as a minor member of the Tribe. She objected to the enrollment in a letter received by the Tribe on May 15, 1981. Despite this, and without further notice or the presence of Ms. L. or Robert or Diana Lewis, the Kiowa Tribe allegedly enrolled Seth as a tribal member on May 16, 1981. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173.)

Counsel for all interested parties, including the Kiowa Tribe, filed briefs with the Sedgwick County District Court on the applicability of the ICWA to the facts of the case. After examining the briefs and court file, the court denied the Tribe's motion to intervene on June 22, 1981, and held the ICWA was inapplicable. The court, however, permitted counsel for the Tribe to sit with and advise counsel for Carmon Perciado. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173.)

Thereafter the Sedgwick County District Court found Carmon Perciado to be an unfit parent and severed his parental rights, in part due to his alcohol and/or drug abuse, his history of violence, and his criminal record. (*In re Baby Boy L.*, 231 Kan. at 211-12, 643 P.2d at 173.) The Kiowa Tribe does not now challenge the propriety of severing Perciado's rights. (*See* Petition for Writ of Certiorari, No. 85-2089, at i.)

The Sedgwick County District Court then proceeded with the adoption petition filed by Robert and Diana Lewis. The court found Ms. L.'s voluntary consent to adoption valid and Mr. and Mrs. Lewis suitable parents. The court therefore granted the adoption petition on June 24, 1981. (*In re Baby Boy L.*, 231 Kan. at 203, 643 P.2d at 173-74.)

The Kiowa Tribe, Carmon Perciado, and Perciado's parents appealed to the Kansas Supreme Court. The Supreme Court held that the ICWA does not apply to the facts of the case. The stated purpose of the Act is "the maintenance of the family and tribal relationships existing in Indian homes and to set minimal standards for the removal of Indian children from their existing Indian environment." (*In re Baby Boy L.*, 231 Kan. at 205-06, 643 P.2d at 175.)

The adoption of Seth could not and did not remove him from an existing Indian environment. At the time of his adoption, Seth was almost five months old and always had lived with his parents, Robert and Diana Lewis. His biological mother had expressly limited her consent to adoption by Mr. and Mrs. Lewis and intended to retain custody if the Lewises were not granted the adoption. Thus, Seth was never a member of an Indian family or community, nor did it appear he would ever become a member of such. The Kansas Supreme Court held that under such circumstances the ICWA does not apply. (*In re Baby Boy L.*, 231 Kan. at 206-09, 643 P.2d at 175-77.)

The Kiowa Tribe never appealed the judgment of the Kansas Supreme Court. Instead, the Tribe attempted a collateral attack on the judgment by filing an action against Mr. and Mrs. Lewis in the United States District Court for the Western District of Oklahoma on September 10, 1982. [*See Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 590 n.1 (10th Cir. 1985). (Petition for Writ of Certiorari, No. 85-2089, App. A at App. 3.)]

The Lewises moved to dismiss the action or in the alternative transfer it to the United States District Court for the District of Kansas. Although the Tribe and its

counsel knew or should have known that the action was barred by *res judicata* and collateral estoppel, the Lewises notified them of this fact in two extensive briefs filed with the court. The district court dismissed the Kiowa Tribe's action in an Order filed April 22, 1983. The court found it had no personal jurisdiction over the Lewises. [*Kiowa Tribe of Oklahoma v. Lewis*, No. 82-1453-R, Order at 11 (W.D. Okla. April 22, 1983). (App. II at A12.)] The Kiowa Tribe did not appeal this dismissal.

On July 5, 1983, the Kiowa Tribe filed this action in the United States District Court for the District of Kansas. The action is identical to the one filed in the Oklahoma federal district court and is yet another collateral attack on the final judgment of the Kansas Supreme Court. Robert and Diana Lewis moved to dismiss the action as barred by *res judicata* and collateral estoppel and again filed extensive briefs. In an Order and judgment entered October 28, 1983, the district court granted the Lewises' motion to dismiss and held the action clearly was barred by the Kansas Supreme Court decision in *In re Baby Boy L.* The court also held the action was frivolous and useless and that Mr. and Mrs. Lewis were entitled to an award of costs and attorneys' fees. [Transcript of Bench Ruling; Petition for Writ of Certiorari, No. 85-2089, App. E at App. 28-29.)]

The Tribe appealed to the United States Court of Appeals to the Tenth Circuit. The Tenth Circuit affirmed the district court and held the action was barred by *res judicata* and collateral estoppel and in light of decisions of the United States Supreme Court. The Tenth Circuit, however, reversed the award of costs and attorneys' fees to Mr. and Mrs. Lewis. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 591-93 (10th Cir. 1985). (Petition for

Writ of Certiorari, No. 85-2089, App. A at App. 9-11.)] The Tribe filed its Petition for Writ of Certiorari to the United States Court of Appeals on June 13, 1986, No. 85-2089.

ARGUMENT AND AUTHORITIES

I. In the Event This Court Grants the Petition for Writ of Certiorari Filed by the Kiowa Tribe, the Matters Raised on Cross-Petition Merit Supreme Court Review Where the Tenth Circuit's Reversal of the Award of Attorneys' Fees and Costs Is Tantamount to Sanctioning a Litigant's Flagrant and Repetitious Departure From the Strictures of Issue and Claim Preclusion.

After fully litigating the issues in the state courts of Kansas, the Kiowa Tribe of Oklahoma attempted to relitigate those issues in the United States District Court for the Western District of Oklahoma. That case was dismissed for lack of personal jurisdiction. The Kiowa Tribe then brought this action in the United States District Court for the District of Kansas attempting to relitigate the same issues by claiming declaratory and injunctive relief under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (ICWA or Act), and under 42 U.S.C. § 1983.

Robert and Diana Lewis moved to dismiss the action under Rules 11 and 12 of the Federal Rules of Civil Procedure because it was patently barred by *res judicata* and collateral estoppel. The district court found that the Tribe's action clearly was barred and that it was frivolous and useless in light of that fact. The court therefore held the Lewises are entitled to an award of costs

and attorneys' fees. [Transcript of Bench Ruling; Petition for Writ of Certiorari, No. 85-2089, App. E at App. 28-29.)] Before the trial court could even consider the proper amount of such an award, the Tribe appealed to the Tenth Circuit, which affirmed that the action was barred by *res judicata* and collateral estoppel, but reversed the award of costs and attorneys' fees. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 591-93. (Petition for Writ of Certiorari, No. 85-2089, App. A at App. 4-5, 10-11.)]

If this Court grants the petition for writ of certiorari filed by the Kiowa Tribe, this Court should also grant the cross-petition and reinstate the trial court's award of costs and attorneys' fees. The award not only was proper, but also *mandated* by the Kiowa Tribe's and its counsel's heedless pursual of an action that they knew, or most certainly should have known, was barred by the fundamental legal doctrines of issue and claim preclusion.

To prevent such flagrant abuse of the judicial process and repetitive attacks on the finality of judgments, this Court should grant the cross-petition for writ of certiorari and reverse the Tenth Circuit's denial of the award of costs and attorneys' fees. This Court should not countenance, and Robert and Diana Lewis should not be forced to endure, the Tribe's and its counsel's conduct. Nevertheless, Robert and Diana Lewis only seek what *res judicata* and collateral estoppel were meant to ensure: an end to litigation and the stability and certainty such affords. Thus, the Lewises seek Supreme Court review of the Tenth Circuit decision only in the event this Court determines it shall review any issues raised by the Kiowa Tribe of Oklahoma in its Petition for Writ of Certiorari, No. 85-2089.

II. The Kiowa Tribe Is Not Immune From an Assessment of Attorneys' Fees and Costs Under the Facts of This Case, Statutory Authority and the Inherent Power of the Federal Judiciary.

Petitioner Kiowa Tribe and its counsel do not have immunity from an appropriate award of costs and attorneys' fees. Tribal immunity is only coextensive with that of the United States. The immunity may be waived expressly by Congress or the tribe, or impliedly when the tribe acts outside the scope of its sovereign authority. *See Rice v. Rehner*, 463 U.S. 713 (1983); *Jicarilla Apache Tribe v. Andress*, 687 F.2d 1324 (10th Cir. 1982). Attorneys' fees properly may and should be assessed against an Indian tribe and/or its counsel that repetitively institutes, and needlessly pursues, frivolous, meritless litigation.

Tribal immunity is coextensive with and not greater than the immunity enjoyed by the United States. In proper circumstances, the federal government may be held liable for attorneys' fees.

> The United States comes before the court on an equal basis, the same as any other party. The responsibility expressed in F.R.Civ.P. 11, applies to the United States as it does to private parties. As the party that filed the complaint, it had an obligation to have reasonable ground to make the allegation in it. [*United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 316, 325 n.3 (D.N.J. 1976).]

See generally United States v. University Savings Association, 666 F.2d 312, *reh'g denied*, 671 F.2d 1381 (5th Cir.), *cert. denied*, 457 U.S. 1106 (1982).

The Tribe's conduct in this case must be deemed outside the scope of its sovereign authority. A tribe and its counsel simply cannot have the authority to abuse the judicial process, ignore well-established precepts of jurisprudence, and subject another party and the courts to repeated lawsuits that they well know are barred and meritless. Finally, federal courts have inherent, equitable power to impose sanctions against a litigant for its misconduct. A tribe should not be absolved of liability for its conduct in litigation it initiated simply because it is an Indian tribe.

III. Robert and Diana Lewis, As Prevailing Parties, Are Entitled to an Award of Costs and Attorneys' Fees Where the Kiowa Tribe and Its Counsel Have Vexatiously and Unreasonably Pursued a Frivolous, Meritless Action.

Under 42 U.S.C. § 1988, a defendant, as a prevailing party, is entitled to an award of attorneys' fees when the plaintiff's action was frivolous, unreasonable, or groundless. *See Hughes v. Rowe,* 449 U.S. 5 (1980); *Christianburg Garment Co. v. EEOC,* 434 U.S. 412 (1978); *Glass v. Pfeffer,* 657 F.2d 252 (10th Cir. 1981).

The decision to award attorneys' fees under section 1988 is committed to the sound discretion of the district court and may not be reversed absent abuse of discretion. In fact, it is *erroneous not* to award attorneys' fees to prevailing defendants when the district court has found the plaintiff's action to be frivolous. *See Campbell v. Cook,* 706 F.2d 1084 (10th Cir. 1983); *Prochaska v. Marcoux,* 632 F.2d 848 (10th Cir. 1980), *cert. denied,* 451 U.S. 984 (1981).

It is patently unreasonable, vexatious, frivolous, and evidence of bad faith to bring an action and continue liti-

gating it when the action is clearly barred by *res judicata* and collateral estoppel.

> Commencement of action upon action based on the same facts dressed in different garb, after thrice being rejected on the merits and having been repeatedly warned that the claims were barred by *res judicata*, can only be explained as malicious conduct. [*Kane v. City of New York*, 468 F. Supp. 586, 592 (S.D.N.Y.), *aff'd*, 614 F.2d 1288 (2d Cir. 1979).]

See also Tonti v. Petropoulous, 656 F.2d 212 (6th Cir. 1981); *Life Science Church v. Vocke*, 531 F. Supp. 790 (E.D. Wis. 1982); *Munshi v. New York University*, 528 F. Supp. 1088 (S.D.N.Y. 1981).

The Tenth Circuit erred for at least three reasons when it reversed the district court's award of attorneys' fees and costs on the basis that the Tribe's action presented issues of first impression and therefore was not frivolous.

First, the Tenth Circuit did *not* decide any issues of first impression in affirming the district court. Instead, the court simply applied the fundamental concepts of *res judicata* and collateral estoppel and noted that the United States Supreme Court has *emphasized* that no exception to the full faith and credit provisions of 28 U.S.C. § 1738 will be recognized absent an express or clearly implied repeal by a later statute. [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 592. (Petition for Writ of Certiorari, No. 85-2089, App. A at App. 9.)] *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982); *Angel v. Bullington*, 330 U.S. 183 (1947).

Second, the Tenth Circuit suggested that the Tribe's action was not frivolous because different results were

reached in *Kickapoo Tribe v. Department of Human Services*, No. 81-947-T, slip op. (W.D. Okla. August 10, 1984), *appeal docketed*, No. 84-2279 (10th Cir. 1984) (a copy of which the Kiowa Tribe of Oklahoma has submitted to the Court). The Tenth Circuit clearly erred in relying upon *Kickapoo Tribe* as a basis for reversing the award of attorneys' fees and costs. The court in *Kickapoo Tribe* did not confront the same issues and facts addressed by the Kansas federal district court. In *Kickapoo Tribe*, the Tribe attempted to intervene in state child custody proceedings. The state court denied the motion to intervene and the Tribe then brought an action in federal district court. *No appeal was taken in the state courts.* (Slip Opinion, No. 81-947-T, at 3-4 (W.D. Okla. Aug. 10, 1984).) Here, the Tribe *did* appeal the denial of its motion to intervene to the Kansas Supreme Court. By choosing this course of action—which the Tribe's counsel admitted in oral argument before the Tenth Circuit to be a knowingly made, strategy decision—the Tribe's *only* recourse was to seek review by the United States Supreme Court, not to launch a collateral attack in federal court.

Third, the Tenth Circuit suggested that in *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, 667 P.2d 228 (1983), the Arizona appellate court reached a different decision on the applicability of the ICWA than the Kansas Supreme Court did in *In re Adoption of Baby Boy L.* This observation or basis for reversing the award of attorneys' fees is incongruous with the doctrines of *res judicata* and collateral estoppel and even inconsistent with the Tenth Circuit's own opinion. "Regardless of whether we agree with the Kansas Supreme Court's construction of the ICWA, here we must honor the judgment it has rendered on the subject." [*Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d at 592. (Petition

for Writ of Certiorari, No. 85-2089, App. A at App. 10.)] *See Reichenberger v. Pritchard,* 660 F.2d 280 (7th Cir. 1981).

Pursuant to the district court's equitable powers, as well as under 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure, sanctions properly are imposed when a party and/or counsel vexatiously and unreasonably multiplies proceedings by bringing and pursuing an action that is meritless, clearly barred, or without jurisdiction. *See Weiss v. United States,* 227 F.2d 72 (2d Cir. 1955); *Davidson v. Allis-Chalmers Corp.,* 567 F. Supp. 1532 (W.D. Mo. 1953).

As under 42 U.S.C. § 1988, an award of attorneys' fees under the court's inherent powers is particularly appropriate when the party and/or counsel brings and maintains an action barred by *res judicata* and collateral estoppel.

> It is especially appropriate to impose sanctions in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit. . . . The imposition of sanctions is one of the few options available to a court to deter and punish people who relitigate cases hopelessly foreclosed. [*McLaughlin v. Bradlee,* 602 F. Supp. 1412, 1417 (D.D.C. 1985).]

See also Allen v. New York Board of Elections, 586 F. Supp. 603 (S.D.N.Y. 1984).

As the district court and the Tenth Circuit found, the Kiowa Tribe's action is barred by well-established legal doctrines. The Tribe and its counsel clearly should have known the action was barred and certainly were put on notice of this fact by the extensive briefs Mr. and Mrs. Lewis filed in the United States District Court for the

Western District of Oklahoma, the United States District Court for the District of Kansas, and with the United States Court of Appeals for the Tenth Circuit. The Tribe's and its counsel's repeated assertion of groundless, frivolous claims is vexatious, unreasonable, and evidence of bad faith. Under such circumstances an award of attorneys' fees and costs is *mandated.*

CONCLUSION

In the event this Court reviews any issues raised by the Kiowa Tribe's petition for writ of certiorari, Robert and Diana Lewis request that the Court also review on cross-petition the Tenth Circuit's reversal of the district court's award of attorneys' fees and costs. This action is *clearly* barred by *res judicata* and collateral estoppel. These doctrines represent the fundamental concept and public policy that there must be an end to litigation. The necessity of these doctrines could not be clearer than here where the well being of a young child and his family are at stake. This Court must not countenance, much less encourage, the Kiowa Tribe of Oklahoma's and its counsel's blatant flaunting of these doctrines. The Court should reverse and remand the Tenth Circuit's decision with regard to the award of attorneys' fees and costs.

Respectfully submitted,

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APPENDIX I

Cross-petitioners hereby incorporate by reference documents appended to the Kiowa Tribe of Oklahoma's Petition for Writ of Certiorari, No. 85-2089, as Appendix A, B, C, D, and E.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KIOWA TRIBE OF OKLAHOMA, individually and in its capacity as Parens Patriae to Seth Allan Lewis, and as Parens Patriae to and on behalf of other members of the Kiowa Tribe,	)	
Plaintiff,	)	CIVIL ACTION
-vs-	)	NO. 82-1453-R
ROBERT LEWIS and DIANA LEWIS,	)	
Defendants.	)	

ORDER

Defendants herein have filed a Motion to Dismiss alleging lack of personal jurisdiction over them, failure to state a claim upon which relief can be granted, and improper venue, and in the alternative asking that the action be transferred to the United States District Court for the District of Kansas. The Plaintiff has filed a response with supporting brief. Defendants filed a reply with supporting brief and Plaintiff thereafter filed a supplemental brief.

This case arises from an adoption proceeding in the state of Kansas. Plaintiff alleges that the adoption proceeding violated the provisions of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. (ICWA), as well as other statutes and constitutional provisions. Defendants are the adoptive parents of Seth Allan Lewis, a child of

5/16ths degree Kiowa Indian blood. Plaintiff seeks a declaratory judgment that the ICWA applied to the Kansas state court adoption proceeding and that the Plaintiff had a right to intervene in those proceedings; that the actions of Defendants in securing and maintaining custody of Seth Allan Lewis violates the ICWA and is in derogation of the sovereign rights of Plaintiff as contained in the Treaty with the Kiowas, October 21, 1867, 15 Stat. 581; and is also in derogation of the First, Fifth, and Ninth Amendments to the United States Constitution and the American Indian Religious Freedom Act, 42 U.S.C. § 1996. Plaintiff also seeks a declaration that Defendants' custody is in violation of 42 U.S.C. § 1983. Plaintiff asks this court to order Defendants to relinquish custody of Seth Allan Lewis to Plaintiff and further, to relinquish all custodial rights awarded by the courts of the State of Kansas.

Seth Allan Lewis is the out of wedlock son of Tina Marie Lazier and Carmen Perciado. Lazier is a non-Indian and Perciado is a 5/8th blood degree Kiowa Indian and an enrolled member of the Tribe. The child was born in Wichita, Kansas, on January 29, 1981. On that same date, Lazier executed a consent to adoption specifically limited to the Defendants herein. Defendants filed the consent form and their petition for adoption in the District Court of Sedgwick County, Kansas, also on the same date, and were granted temporary custody.

Perciado was served with notice of the adoption proceedings at the Kansas State Industrial Reformatory in Hutchinson, Kansas, where he was incarcerated and he thereafter filed an answer objecting to the adoption. Perciado, represented by the Legal Aid Society of Wichita, Inc., requested that his parental rights not be severed and that he be given permanent custody of the child.

On March 30, 1981, the Sedgwick County District Court began hearing evidence on Perciado's fitness as a father, to determine whether his parental rights should be severed and on the adoption itself. The trial was recessed until April 1, 1981, at which time the court was informed that Perciado was a member of the Kiowa Tribe and that the ICWA might be applicable. The court continued the case for thirty days in order to serve proper notice on the Kiowa Tribe, Plaintiff herein. Thereafter, notice was served on the Kiowa Business Committee in Anadarko, Oklahoma. The date of said notice does not appear from the pleadings on file.

On April 14, 1981, Lazier filed an amended consent to the adoption also strictly limited to the Defendants. On May 7, 1981, Perciado filed an amended Answer alleging the ICWA applied to the adoption proceedings. On May 8, 1981, the Plaintiff Kiowa Tribe filed a petition to intervene and on May 16, 1981, the Business Committee of the Kiowa Indian Tribe, sitting in Anadarko, enrolled the child as a member of the Tribe, over the objections of Lazier. On June 15, 1981, Perciado and the Plaintiff Tribe filed a petition to change temporary custody and transfer jurisdiction to the Court of Indian Offenses in Anadarko.

After all parties submitted briefs on the applicability of the ICWA, the court reconvened on June 24, 1981. The court found the ICWA did not apply and therefore denied the Plaintiff's motion to intervene. The court declared the petition to transfer custody and jurisdiction moot and then heard additional evidence from Perciado on his fitness and request for custody.

The court found Perciado unfit based on his lengthy criminal record, his absence of interest in children, and

the fact that he had offered to pay for an abortion for Lazier. The court went on to find Defendants suitable persons to adopt the child. The court therefore severed any rights which Perciado might have had in the child, denied custody to Perciado, and granted Defendants adoption of the child.

Perciado and Plaintiff appealed the decision to the Supreme Court of Kansas. On April 3, 1982, that court rendered a decision reported as *Matter of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (Kan. 1982), holding that the ICWA did not apply to the adoption proceedings and that even if it had, Plaintiff could never obtain custody of Seth Allan Lewis under Kansas law, K.S.A. 59-2102, or the ICWA, § 1913, because Lazier's consent to adoption was limited to the Defendants. The Supreme Court stated:

> She [Lazier] has made it clear that if this adoption was denied for any reason, or if an attempt was made to place the child for adoption under the terms of the Act, she would revoke her consent and again take custody of her child, and never consent to his placement with his father, or with the father's extended Indian family, the Kiowa Tribe, the grandparents or anyone else. 643 P.2d at 177.

The Supreme Court therefore affirmed the lower court.

Plaintiff did not appeal from the decision of the Kansas Supreme Court, but instead on September 10, 1982, filed the instant action. *Although represented by the same counsel, Plaintiff has not, in any pleadings filed in the instant action, explained its failure to appeal the Kansas decision.* (Our emphasis.)

Section 1914 of the ICWA provides:

> § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations.
>
> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Defendants contend this court is not a court of competent jurisdiction because it lacks personal jurisdiction over the Defendants. For purposes of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the burden of proof rests upon the party asserting the existence of jurisdiction. *Wilshire Oil Co. of Texas v. Riffe*, 409 F.2d 1277, 1282 (10th Cir. 1969); *Radiation Researchers, Inc. v. Fischer Industries, Inc.*, 70 F.R.D. 561, 563 (W.D. Okla. 1976).

A court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 110 (1969); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Generally, personal jurisdiction is acquired by valid service of process in accordance with Rule 4, Federal Rules of Civil Procedure. *Attwell v. LaSalle National Bank*, 607 F.2d 1157, 1159 (5th Cir. 1979) *cert. denied* 445 U.S. 954.

Rule 4(e) provides that service upon a party not an inhabitant or found within the forum state may be made

when authorized by a statute of the United States or by a statute or rule of court of the state in which the district court is held. In both diversity and federal question cases, a district court may look to state law to determine in which manner and under what circumstances a non-resident defendant can be subjected to the jurisdiction of a federal court. *United States v. First National City Bank,* 379 U.S. 378, 381 n.3 (1965); *Marsh v. Kitchen,* 480 F.2d 1270, 1272 (2nd Cir. 1973).

Plaintiff contends that § 1914 of the ICWA authorizes nationwide service. Plaintiff contends that "competent jurisdiction" must be construed to allow nationwide service in order to effectuate the purposes of the ICWA. Plaintiff contends that tribes cannot afford the costs of litigating ICWA cases in states other than the state where the tribe is located. As authority for this construction, Plaintiff relies on *Bryan v. Itasca County,* 426 U.S. 373 (1976) wherein the Supreme Court said:

> "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." 426 U.S. at 392 citing *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918).

However, this canon of construction is to be used in construing ambiguous statutes. Section 1914 is not ambiguous. Plaintiff seeks to expand the meaning of the word "competent" to confer jurisdiction over persons who may have absolutely no relationship with the forum state. Had Congress contemplated bestowing such power on district courts, it surely would have done so in explicit terms. The legislative history of the ICWA does not indicate even a glimmer of such an intent. 1978 U.S. Code

Cong. and Admin. News, p. 7530 et seq. p. 7546. This court declines to so distort statutory language.

Plaintiff next contends that the Kiowa Tribe as a quasi sovereign nation is not bound by the laws of the State of Oklahoma insofar as service of process is concerned. Plaintiff alleges that the issue is not the number of contacts Defendants had with the State of Oklahoma but the number of contracts Defendants had with the Tribe and whether Kiowa tribal law would permit service of process and personal jurisdiction. Plaintiff contends "on information and belief" that Kiowa tribal law permits nationwide service of process. Plaintiff then alleges that Defendants have had, and continue to have sufficient contact with the Tribe so that the exercise of personal jurisdiction does not offend due process.

An Indian tribe is not a foreign state, especially not for purposes of jurisdiction. *The Cherokee Nation v. The State of Georgia,* 30 U.S. (5 Pet.) 1, 17-18 (1831). It is well-settled that for jurisdictional purposes, an Indian Tribe is a citizen of the state in which it resides. *Schantz v. White Lightning,* 502 F.2d 67, 70 (8th Cir. 1974); *Oneida Indian Nation of New York v. County of Oneida,* 464 F.2d 916, 923 (2nd Cir. 1972), rev'd on other grounds 414 U.S. 661 (1973). (Therefore, this court must look to the laws of the State of Oklahoma to determine whether the exercise of personal jurisdiction over Defendants is proper.

The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with constitutional requirements of due process. *Yarbrough v. Elmer Bunker and Associates,* 669 F.2d 614, 616 (10th Cir. 1982) citing *Luckett v. Bethlehem Steel Corp.,* 618 F.2d 1373, 1385-1386 (10th Cir. 1980).

The Oklahoma long-arm statutes authorizing personal jurisdiction are 12 O.S. 1972 § 187 and 12 O.S. 1965 § 1701.03 which provide, *inter alia*:

§ 187. In personal jurisdiction over certain nonresidents—Service of process—Venue

(a) Any person, firm, or corporation other than a foreign insurer licensed to do business in the State of Oklahoma whether or not such party is a citizen or resident of this State and who does, or who has done, any of the acts hereinafter enumerated, shall have submitted himself, and if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising, or which shall have arisen, from the doings of any said acts:

(1) the transaction of any business within this STATE;

(2) the commission of any act within this State;

(3) the manufacture or distribution of a product which is sold in the regular course of business within this STATE and is used within this STATE;

(4) contracting to insure any person, property, or risk located within the State at the time of contracting.

(b) Nothing herein contained limits or affects the right to serve any process in any manner now or hereafter provided by law.

§ 1701.03. Bases of jurisdiction

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to

a cause of action or claim for relief arising from the person's:

(1) transacting any business in this state;

(2) contracting to supply services or things in this state;

(3) causing tortious injury in this state by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(5) having an interest in, using, or possessing real property in this state; or

(6) contracting to insure any person, property, or risk located within this state at the time of contracting; or

(7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States.

(b) When jurisdiction is based solely upon this section, the defendant's appearance does not authorize the exercise of personal jurisdiction except as to a cause of action or claim for relief arising in the circumstances enumerated in this section.

If the exercise of personal jurisdiction is authorized, it may be authorized by § 1701.03(7). Plaintiff contends

that Defendants actively and voluntarily sought the custody of Seth Allan Lewis who is a member of the Kiowa Tribe. Plaintiff contends that this voluntary act of seeking and maintaining custody is sufficient to satisfy the requirements of due process. It is uncontroverted that Defendants have had no other contract with this state.

Oklahoma's long-arm statutes were intended to expand the proper exercise of in personam jurisdiction over nonresidents to the outer limits permitted by the due process requirements of the United States Constitution. *George v. Strick Corporation,* 496 F.2d 10, 12 (10th Cir. 1974); *Fields v. Volkswagen of America, Inc.,* 555 P.2d 48, 52 (Okla. 1976). Due process requires that defendants have certain minimum contacts with the territory of the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. It is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958); *Anderson v. Shiflett,* 436 F.2d 1036, 1038 (10th Cir. 1971).

In the instant case, Defendants did not voluntarily and actively seek out a member of the Plaintiff Tribe to adopt. They commenced adoption proceedings in the State of Kansas with the express consent of a non-Indian natural mother who was also a resident of Kansas. It is the Plaintiff Tribe which actively pursued contact with the Defendants and the State of Kansas. By seeking

to intervene in the adoption proceedings. Seth Allan Lewis became a member of the Plaintiff Tribe in Oklahoma only by unilateral activity of the Plaintiff. The only connection with this forum is the blood relationship between the child and the Tribe. This is insufficient to require Defendants to defend themselves in this forum.

Defendants' Motion to Dismiss for lack of personal jurisdiction is granted. The court need not consider the other issues raised. This case is dismissed.

IT IS SO ORDERED this 22nd day of April, 1983.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT
JUDGE

ENTERED IN JUDGMENT DOCKET ON APRIL 22, 1983